

**UNITED STATES DISTRICT COURT**  
**WESTERN DISTRICT OF LOUISIANA**  
**SHREVEPORT DIVISION**

**JACOBY JAVAN FOSTER**

\* **CIVIL ACTION NO. 14-3279**  
**Section P**

**VERSUS**

\* **JUDGE DONALD E. WALTER**

**D. GARDNER, ET AL.**

\* **MAG. JUDGE KAREN L. HAYES**

**REPORT AND RECOMMENDATION**

On March 3, 2015, the district court entered a judgment staying this matter pending resolution of state court criminal proceedings against plaintiff. (March 3, 2015, Judgment [doc. # 6]). The judgment directed the parties to file a status report with the Clerk of Court within 30 days after conclusion of the criminal proceedings against plaintiff. *Id.*

On June 30, 2016, the court observed that more than one year had elapsed since entry of the stay, but plaintiff had not filed a status report. [doc. # 8]. Accordingly, the court directed plaintiff to file a status report within 30 days that addressed the posture of the state court criminal proceedings against him. *Id.* The court cautioned plaintiff that his un-excused failure to heed the order may result in dismissal of the case for failure to prosecute and/or to comply with court order(s). *Id.*

On July 11, 2016, the United States Postal Service returned to the Clerk the court's June 30, 2016, order, with a notation on the envelope stating "RTS [return to sender] gone." [doc. # 9]. Plaintiff has not contacted the court since May 2015, and has not advised the court of his present whereabouts.

### *Law and Analysis*

The Federal Rules of Civil Procedure provide that “[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.” Fed.R.Civ.P. 41(b) (in pertinent part). The Supreme Court has interpreted this rule as authorizing the district court to dismiss an action *sua sponte*, even without a motion by defendant. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31, 82 S.Ct. 1386, 1388-89 (1962).

“The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the [d]istrict [c]ourts.” *McCullough v. Lynaugh*, 835 F.2d 1126, 1127 (5th Cir.1988).

Local Rule 41.3 provides that,

[t]he failure of an attorney or a pro se litigant to promptly notify the court in writing of an address change may be considered cause for dismissal for failure to prosecute when a notice is returned to the court for the reason of an incorrect address and no correction is made to the address for a period of 30 days.

Here, more than 30 days have elapsed since correspondence to plaintiff was returned as undeliverable, without any notification by plaintiff as to his current whereabouts.

To the extent that the applicable statute of limitations may bar plaintiff from re-filing the instant suit, then dismissal at this juncture effectively will constitute dismissal “with prejudice,” – “an extreme sanction that deprives the litigant of the opportunity to pursue his claim.” *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1190 (5<sup>th</sup> Cir. 1992) (internal quotations omitted).

Dismissal with prejudice for failure to prosecute or to comply with a court order is warranted only where “a clear record of delay or contumacious conduct by the plaintiff exists and a lesser sanction would not better serve the interests of justice.” *See Millan v. USAA General Indem.*

*Co.*, 546 F.3d 321, 325 (5<sup>th</sup> Cir. 2008) (citations and internal quotation marks omitted). In addition, the Fifth Circuit generally requires the presence of at least one of three aggravating factors: “(1) delay caused by [the] plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct.” *Id.*

The undersigned finds that the requirements for a dismissal with prejudice are satisfied in this case. As discussed above, plaintiff has ignored a rule of this court by failing to update his current address. As plaintiff is proceeding *in forma pauperis*, it is unlikely that he enjoys sufficient means to fund an alternative monetary sanction.<sup>1</sup> Moreover, dismissal with prejudice may be the least sanction where, as here, there is every indication that plaintiff no longer wishes to pursue his cause of action.<sup>2</sup> Finally, plaintiff’s unrepentant flaunting of court orders<sup>3</sup> reflects his own contumaciousness or “stubborn resistance to authority”<sup>4</sup> which is personally attributable to him as a litigant unrepresented by counsel.<sup>5</sup>

For the foregoing reasons,

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<sup>1</sup> See *Brown v. Oil States Skagit Smatco*, 664 F.3d 71, 78 n.2 (5<sup>th</sup> Cir. 2011) (noting that a court may consider a plaintiff’s IFP status in determining that a monetary sanction would not be an appropriate and effective sanction).

<sup>2</sup> Certainly, if plaintiff disputes this inference, he may so demonstrate in his objection to the instant report and recommendation.

<sup>3</sup> This report and recommendation itself provides plaintiff with further notice of his non-compliance.

<sup>4</sup> See *Millan, supra*.

<sup>5</sup> While the court is aware that plaintiff is not represented by counsel, “the right of self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law.” *Kersh v. Derozier*, 851 F.2d 1509, 1512 (5<sup>th</sup> Cir. 1988) (quoting *Birl v. Estelle*, 660 F.2d 592, 593 (5<sup>th</sup> Cir. 1981)).

IT IS RECOMMENDED that the stay be lifted, and that plaintiff's complaint be DISMISSED, with prejudice, in accordance with the provisions of Fed.R.Civ.P. 41(b).

Under the provisions of 28 U.S.C. §636(b)(1)(C) and FRCP Rule 72(b), the parties have **fourteen (14) days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within **fourteen (14) days** after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before the Judge makes a final ruling.

**A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN FOURTEEN (14) DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.**

In Chambers, at Monroe, Louisiana, this 23<sup>rd</sup> day of August 2016.

  
KAREN L. HAYES  
UNITED STATES MAGISTRATE JUDGE